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IN THE

Supreme Court of the United States

GRAHAM COUNTY SOIL & WATER CONSERVATION DISTRICT; CHEROKEE COUNTY SOIL & WATER CONSERVATION DISTRICT; GERALD PHILLIPS; ALLEN DEHART; LLOYD MILLSAPS; BILL TIPTON; C.B. NEWTON; EDDIE WOOD; GRAHAM COUNTY

Petitioners,

v.

UNITED STATES OF AMERICA EX REL. KAREN T. WILSON,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Fourth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Should the courts borrow a limitations period from state law for claims of retaliatory discharge under section 3730(h) of the False Claims Act, instead of following the express language of Section 3731 of the False Claims Act, which provides a six-year statute of limitations to all civil actions filed under section 3730, on the ground that Congress could not have intended its statute to be read literally given the theoretical possibility of anomalous results that have never presented themselves in a single reported case in the eighteen years since the cause of action and the limitations period were established?

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STATEMENT

A. Facts[1]

Beginning in January 1993, respondent Karen T. Wilson worked as a secretary for petitioner Graham County Soil and Water Conservation District. Her office became involved with the Emergency Watershed Protection Program, a federal disaster relief program responding to a storm in February, 1995, the North Carolina Agricultural Cost Share Program, a federally assisted program to aid local farmers, and Farm Services Agency programs for cropland improvement. In connection with her job, she learned of several ways in which local officials milked the program to obtain payments for work that had not been done, or to sell products to farmers while pocketing the proceeds, by filing false reports and forging the signatures of the landowners that were supposedly being benefitted. She also learned that local officials had made arrangements for their friends to receive payments for which they did not qualify by falsifying reports.

Wilson was ordered to issue payments despite their evident illegality. She reported these shenanigans to the proper authorities, first within her own agency and eventually to the federal government. She provided evidence to state and federal law enforcement investigators, and testified at the criminal trial of one participant, who was convicted on felony charges in 1999.

After her superiors learned that Wilson was blowing the whistle on them, they tried to get evidence of wrongdoing destroyed, and they tried to "kill the messenger" instead of rectifying the problem. The targets of her disclosures, and their

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[1]The statement of facts is based on the complaint. Because the case was dismissed as untimely, no further factual development has occurred.

associates, began a campaign of harassment against Wilson and her family. A gun barrel was left on her desk and threats and obscene gestures, including threats of physical violence, were directed at Wilson and her family. Superiors gave her critical evaluations and threatened to close the office where she worked. Wilson's co-workers ostracized her. This treatment caused Wilson grave physical and emotional distress, which left her bedridden for a month. After she returned from a medical leave of absence, the harassment continued, and, eventually, in 1997, she was forced to resign.

B. Proceedings Below

On January 25, 2001, Wilson filed a sealed complaint in the United States District Court for the Western District of North Carolina. She proceeded under the False Claims Act ("FCA"), 31 U.S.C. § 3730, proceeding both as a qui tam relator under section 3730(b), seeking repayments to the United States, and on her own behalf under section 3730(h), seeking remedies for her harassment and constructive discharge. After the United States declined to intervene, the complaint was unsealed and petitioners moved to dismiss, arguing both that all of Wilson's claims were barred by the doctrine of municipal immunity, and that her retaliation claims were time barred because she had not sued within the three-year period allowed by the North Carolina statute of limitations for wrongful discharge. Petitioners also contended that Wilson's complaint did not allege fraud with sufficient specificity. Wilson responded that her claim was governed by the six-year limitations provided for section 3730 claims by 31 U.S.C. § 3731(b). In an opinion reported at 2002 WL 487162, the Magistrate Judge recommended granting the motion to dismiss on immunity and specificity grounds, but reserved the limitations issue because, he concluded, several relevant facts

were unavailable (Pet App. 91a n.2-92a).

Wilson filed timely objections to this report, but petitioners did not, waiving any objections to the Magistrate Judge's failure to reach the limitations issue. In an opinion reported at 2002 WL 31455718, the district judge reversed on the issue of municipal immunity, ruling in agreement with the Seventh Circuit that Congress clearly intended that the FCA would apply to municipalities. The judge agreed with petitioners, however, that Wilson had not alleged petitioners' fraud with sufficient specificity, and directed Wilson to amend her complaint. The judge also reached out, sua sponte, to decide the limitations issue and dismissed Wilson's retaliation claim on that ground. The court acknowledged that the language of the statute expressly extends the limitations period to all civil actions under section 3730, but found it anomalous to apply that limitations period to actions under section 3730(h) because the period begins to run when the underlying False Claims Act violation is committed, or at least when that violation is discovered. The court was concerned that applying such a statute of limitations to retaliatory discharges could produce anomalous results because, if no violation of the False Claims Act was ever committed, the statute would never have begun to run and therefore a claim for retaliation would be foreclosed by the limitations provision (Pet. App. 69a). Based on this reasoning, the district court assumed that Congress must not have intended the limitations period to be applied according to its terms, but rather must have intended to leave the issue of a limitations period to be resolved by borrowing the most analogous state period. *Id.* Because the most analogous state period was North Carolina's three year period for wrongful discharges, the court decided to borrow that period, under which Wilson's claim would be time-barred.

Wilson amended her complaint as directed, but also moved in the alternative for reconsideration of the limitations

ruling, pointing out that a different district court in the Fourth Circuit had applied the express limitations period in a carefully reasoned decision. *Storey v. Patient First Corp.*, 207 F. Supp. 2d 431 (E.D. Va. 2002). In an opinion reported at 224 F. Supp. 2d 1042, the district judge upheld most of the amended qui tam allegations as sufficiently specific, but refused to reconsider his limitations ruling. However, the district court certified the limitations issue for immediate appellate review under 28 U.S.C. § 1292(b).

The United States Court of Appeals for the Fourth Circuit reversed. The majority found no statutory ambiguity and hence no reason to refuse to apply the express statutory command that the limitations period for all causes of action under section 3730 run six years from the alleged violation on which the employee blew the whistle and, consequently, faced retaliation. The majority was unimpressed by the claim that possible anomalies that might be presented in other cases made the statute ambiguous (Pet. App. 17a-21a). Relying heavily on Judge Easterbrook's analysis for a unanimous Seventh Circuit in *Neal v. Honeywell*, 33 F.3d 860 (7th Cir. 1994), the court also concluded that the supposed anomaly found below did not exist. After all, nothing in the statute requires a court to find that section 3729 was actually violated in order to decide whether whistleblowing was protected against retaliation, just as retaliation provisions in other federal statutes are generally read to protect good faith reports of wrongdoing (Pet. App. 22a-24a). Nor was the court troubled by another claimed anomaly, the possibility that some employees might suffer retaliation more than six years after the underlying False Claims Act violation. The court reasoned that, should such a case ever be presented, the limitations period could be subject to equitable tolling or equitable estoppel (Pet App. 20a-21a).

Judge Wilkinson dissented, arguing that, despite the statute's clear language, Congress could not have set the time

for suing for retaliatory discharge turn on something other than the discharge itself. (Pet. App. 35a36a). Moreover, because Congress changed the previous language of the limitations provision, which required suit "within 6 years from the date the violation was committed," to language forbidding suit "more than six years after the date on which the violation of section 3729 was committed," Congress must have intended the statute of limitations to apply only to those section 3730 claims that were brought over violations of section 3729 (Pet. App. 32a-35a). The dissent also expressed concern that an employer could simply wait for several years after the employee reported a false claim to exact its revenge, without ever explaining why there is any likelihood that a court would ever find a causal relation between protected activity and alleged retaliation when the adverse employer conduct is remote in time from the protected activity (Pet. App. 36a-39a). In addition to the anomalies rebutted by the majority, Judge Wilkinson also expressed concern that six years is simply too long to be a good limitations period. Because Congress would not choose a time frame well in excess of analogous state limitations periods, he reasoned, the express six-year period should be read to apply to as few claims as possible (Pet App. 29a).

REASONS FOR DENYING THE WRIT

Although the decision below conflicts with the decision of the Ninth Circuit in *United States ex rel. Lujan v. Hughes Aircraft Co.*, 162 F.3d 1027 (1998), the issue of the proper limitations period is a minor issue of statutory interpretation that is not causing substantial difficulties in the lower courts. In fact, it simply does not come up very often, with barely more than a dozen reported cases addressing the limitations issue for FCA retaliatory discharge claims over the eighteen years since that cause of action was adopted, or less than one limitations

decision per year. Moreover, the decision below represents the trend of decisions among the lower courts, and the Ninth Circuit's reasoning simply does not present a persuasive case for disregarding the plain language of the statute or for delving into legislative history.

Additionally, the supposed anomalies that have concerned a few judges are more theoretical than real. Although all the courts required to decide this question, except the Ninth Circuit, have applied the FCA's own limitations period, there is not a single reported case presenting the hypothetical scenarios about which the Ninth Circuit and the dissent have expressed concern. There is no reason to grant plenary review instead of allowing the Ninth Circuit's approach to become more isolated.

1. The petition is correct in one respect. There is a disagreement between the holdings of the Ninth Circuit in *Lujan* and the decision below, in that the Ninth Circuit has held that the FCA does not provide a limitations period for claims of employees that they have suffered retaliation for blowing the whistle on FCA violations. The court below acted in accordance with the Seventh Circuit's decision in *Neal*; indeed, the decision below is in accord with the holdings in **every** court outside the Ninth Circuit that has addressed the issue, including the nonprecedential decision of the Third Circuit in *United States ex rel. Malloy v. Telephonics Corp.*, 68 Fed. Appx. 270 (3d Cir. 2003).[2] The fact remains, however, that counsel's research has identified barely more than a dozen reported decisions that have addressed the limitations period for such suits, and most of them are from courts in the Fourth or Ninth

[2] *E.g.*, *U.S. ex rel. Tillson v. Lockheed Martin Energy Systems*, 2004 WL 2403114 (W.D. Ky. 2004); *Grand ex rel. U.S. v. Northrop Corp.*, 811 F. Supp. 333 (S.D. Ohio 1992).

Circuits. Indeed, counsel have been able to identify only one decision in which a judge expressed tentative agreement with the Ninth Circuit's position, and in that case it was unnecessary to choose between borrowing a state limitation and applying the FCA's six year period because the suit would have been timely under either one.[3] Thus, although petitioners argue that it is imperative that this Court act now to resolve the conflict among the circuits, because thousands of FCA cases have been filed since 1986, it is apparent that the issue of the proper limitations period for retaliation claims is **not** one that is roiling the lower courts. Rather than rushing to resolve this minor conflict, respondents suggest that it may be better to wait to see whether the consensus continues to develop everywhere except the Ninth Circuit, and whether the Ninth Circuit reconsiders its minority position. The conflict may thus vanish without any need for the Court's intervention.

Moreover, the issue here is one pertaining not to the standards for primary conduct, but only the time within which that primary conduct must be litigated. Once employers know what limitations period has been adopted within their circuit, they can easily adopt record retention policies that will prepare them for the possibility of particular kinds of litigation. There is no great need to decide this question now.

2. Neither the Ninth Circuit in *Lujan*, nor the dissenting opinion below, nor petitioners, have offered any construction of the actual language of the statute that supports either their holding, or even their contention that there is sufficient ambiguity in the language that resort to legislative history is required. Section 3729 of the FCA forbids the knowing

[3] *U.S. ex rel. Ackley v. International Business Machines Corp.*, 110 F. Supp. 2d 395 (D. Md. 2000).

submission of false or fraudulent claims for payment or approval. Section 3730 then creates three causes of action – by the Attorney General if he finds that a person has violated section 3729, § 3730(a); by any person as a qui tam action, brought in the name of the government, for a violation of section 3729, § 3730(b)-(f); and by an employee who suffers retaliation at the hands of his employer "because of lawful acts . . . in furtherance of an action under this section." § 3730(h). Section 3731, in turn, provides as follows:

(b) A civil action under section 3730 may not be brought —

> (1) more than 6 years after the date on which the violation of section 3729 is committed, or
>
> (2) more than 3 years after the date when facts material to the right of action are known or reasonably should have been known by the official of the United States charged with responsibility to act in the circumstances, but in no event more than 10 years after the date on which the violation is committed, whichever occurs last.

There is no question that Wilson has brought a "civil action under section 3730." Nor is there any dispute that she brought her suit less than six years before the alleged violations of section 3729 on which her complaints were based. Accordingly, under the plain language of section 3731(b)(1), her action is timely. No construction of the relevant language has been presented that would permit the section to be construed any other way.

3. Petitioners' theories, and the reasoning of the judges who have rejected the plain language of section 3731(b)(1), are

all based on the proposition that application of that section, or of section 3731(b)(2), would supposedly present a variety of anomalies and cause "claim shopping," as employees sought to shoehorn other kinds of whistleblowing claims into the FCA, and hence that the Court should infer that Congress would not have intended to enact such an absurd statute. Accordingly, it is contended that resort to legislative history is appropriate to decide what Congress really meant. Of course, there is no need to consider legislative history if the language of the statute is clear, and in any event the supposed anomalies not only do not exist, but depend on constructions of the statutes that the lower courts, even the Ninth Circuit, have consistently refused to embrace in considering questions other than the application of section 3731(b) to retaliation actions.

Each of these hypotheticals offers a fascinating puzzle, requiring construction of other provisions of the FCA; they are ventilated in the opinions below as well as in the Seventh Circuit and Ninth Circuit decisions, and in *Storey v. Patient First Corp.*, 207 F. Supp. 2d 431, 440-446 (E.D.Va. 2002). There is, however, a decided air of unreality to this aspect of petitioners' argument, because the crucial point is that the concerns expressed **are** strictly hypothetical – not only need they not be resolved to decide this case, but petitioners do not identify a single litigated case in the 18 years since the statute was enacted, or the ten years since the Seventh Circuit's plain-meaning decision in *Neal v. Honeywell*, in which the hypothetical facts were presented. Nor did counsel's research on Westlaw turn up a single case presenting the hypothetical facts on which petitioners' arguments are based. Accordingly, there is no need for this Court to decide, at this time, how each of those hypotheticals should be decided.

4. Petitioners' argument creates anomalies of its own. Petitioners argue simultaneously that state-law limitations periods need to be borrowed to protect employees who file suit

more than six years after the underlying false claim from being discharged (even though no such employee has ever filed an FCA retaliation suit so far as the reported cases reveal), while at the same time they complain that six years is too long for a statute of limitations, especially in the labor context where back pay may be at issue. This is, of course, a strange argument in that no-one disputes that Congress did, in fact, choose a six-year limitations period for most FCA claims. This Court, however, has flatly stated that a limitations period of six years "is not long enough to frustrate the interest in a relatively rapid disposition of labor disputes." *North Star Steel Co. v. Thomas*, 515 U.S. 29, 36 (1995).

North Star Steel reminds us of yet another way in which petitioners' argument is anomalous – although the Court has now ruled that municipalities can be liable for FCA violations, the FCA is aimed primarily at private employers, and private employers tend to be concerned about the forum shopping that borrowing limitations periods from state law would encourage. *Id.*, at 36-37. In *Neal v Honeywell*, 33 F.3d at 865, Judge Easterbrook identified a major advantage of applying section 3731 as written – it makes the limitations period run from an easily determined point in time, the time of the claim on which the employee blew the whistle. Following the FCA's plain meaning by using a uniform federal period also promotes predictability and ease of judicial administration by avoiding the need to decide which state or federal statute provides the best analogy for borrowing. There is no reason, then, for this Court to step in to prevent the law from continuing to develop in the lower courts as the Ninth Circuit's approach becomes more and more the outlier.

5. Although petitioners have rummaged through the legislative history to try to cast doubt on whether Congress deliberately planned to apply the section 3731 limitations period to the section 3730(h) cause of action, they have shown

only that the limitations period was being revised at a time when the cause of action for retaliation was not yet incorporated into section 3730. Petitioners have identified no reason to believe that Congress would have wanted to have a uniform federal limitations period for most FCA claims, while asking the courts to borrow analogous state limitations periods for retaliation claims. Indeed, petitioners amply show that when adopting whistleblower provisions for other federal statutes, Congress routinely includes an express limitations period, although they tend to be shorter, in part because they are periods for filing short administrative forms rather than lawsuits. At best, it seems likely that Congress drafted the statute carelessly, and never considered what limitations period might apply to the new cause of action for retaliatory discharge. While the Court waits for Congress to fix its "mistake," if it chooses to do so, there is no reason not to apply the statute the way Congress wrote it – as extending to **all** of the three causes of action provided by section 3730 the express limitations period provided by section 3731(b).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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